of fact, without reference to accompanying circumstances, such for instance, as the age or health of the party." It would therefore seem, that when the circumstantial evidence in support of marriage becomes confused by conflicting inferences, that it rests wholly with the jury, unbiassed by any binding instruction from the court to weigh against each other the fundamental facts from which the countervailing presumptions are deduced, and to strike that balance which best accords with the special circumstances of each individual case. J. P. B.

Supreme Court of Tennessee.

JACOB RENEGAR *v.* THOMAS C. THOMPSON.

If a creditor take a mortgage from the principal debtor on sufficient property to secure his debt, and afterwards enter into a different agreement with such debtor and abandon the mortgage, such acts will discharge the surety, who may make the defence in a court of law and will not be compelled to resort to a bill in equity.

On the 18th April 1873, James Mathews, with James Tatum and Jacob Renegar as his sureties, executed his note to Thompson for $300, due 25th December thereafter. On 25th November 1875, suit was brought. The defences of the security, Renegar, were, First: That he had given to Thompson verbal notice to collect the note, &c.; second: that Thompson had taken a mortgage from Mathews on a saw-mill, of the value of $2000 or $2500, to secure said debt, and afterwards abandoned the mortgage and made another and different arrangement with the principal, Mathews, without the knowledge or consent of Renegar. These facts were proven on the trial.

The opinion of the court was delivered by

Turney, J.—The verbal notice to sue was not a defence at law, as the statute requires such notice to be given in writing and proven by two witnesses. The circuit judge ruled that the taking of the mortgage and its abandonment for "another and different arrangement," as the plaintiff was shown to have admitted, was no defence to the action. This was error; the rule is, a creditor must, in all transactions with the principal debtor, act with the most perfect good faith toward sureties, for if he does any act injurious to them or inconsistent with their rights, or omit to do any act, which his duty to them requires, whereby they are injured, they will be discharged from responsibility: *Bond* v. *Ray*, 5 Humph. 492.

We know of no case in our state in which this question has arisen at law. In the case of *King* v. *Baldwin*, 17 Johns. 384, Chief Justice Spencer said: "The principle adopted by this court

in *Rathbone* v. *Warren*, that a surety will be discharged if a new agreement be entered into between the creditor and the principal debtor, varying or enlarging the time of performance of a contract, although amply supported by cases decided in the English courts, is of modern growth even in a court of equity, and it is well settled now that this defence may be set up in equity." I do not, then, perceive any solid objection to a court of law taking cognisance of the matter forming the grounds of the appellant's relief, because in such cases courts of equity have also jurisdiction. Much less do I perceive the necessity of applying to a court of equity to compel a creditor to do what equity and good conscience require of him."

If this duty exists and does bind the conscience of the creditor, I cannot conceive why it may not be brought into exercise by an act *in pais*, and without the intervention of a court of equity. This reasoning applies in all its force to the case in hand.

If the acts and conduct of the creditor are of a sort to discharge a surety, we know of no substantial reason why the surety may not avail of them by proper pleas, to an action at law; why may he not defend in the forum selected by the creditor, rather than be compelled to resort to the jurisdictive powers of a court of equity and then make a successful defence upon precisely the same facts that would be elicited under proper pleadings at law? If such was ever the rule, it was highly technical and without the support of reason, and should give way to the constant progress of improvement in our system of jurisprudence.

The matters of defence offered here, are plain and simple facts, without the least complication, of easy comprehension by a jury, and present no reasonable ground for exclusive equity jurisdiction unless it be a pure technicality.

The facts claimed to effect the discharge of the surety are as easy and intelligible as would be those under pleas of payment, set-off, accord and satisfaction, arbitrament and award, or any of the other pleas commonly pleaded in a court of law, and we can conceive of no reason for distinguishing between the case at law and the cases instanced. The abandonment of the mortgage in consideration of another arrangement with the principal debtor, was bad faith to the security whereby he was injured.[1]

Judgment reversed.

[1] See *Gillespie* v. *Darwin*, 6 Heisk. 21, and *Lindsay* v. *Champion*, 1 Baxter 466, to the same effect.